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ABSTRACT

Two recent decisions of the United States Supreme Court have emasculated First Amendment guarantees for military personnel. In the first case, Parker v. Levy, an Army captain urged enlisted Special Forces personnel at his post to refuse to go to Viet Nam, claiming that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children." His statements were deemed violative of Articles 133 and 134 of the Uniform Code of Military Justice, which provide punishment for conduct unbecoming an officer and a gentleman and for all disorders and neglects to the prejudice of good order and discipline in the Armed Forces. In rendering its decision, the court reasoned that the historical context and language of the General Articles of the Uniform Code provided "fair notice" that the officer's conduct was punishable. In the second case, Brown v. Glines, a serviceman drafted petitions to several congressmen complaining about grooming standards imposed upon Air Force personnel and then circulated the petitions without seeking prior approval from the base commander. The court found the regulations authorizing prior restraint to be reasonably necessary to the unimpeded operation of the military establishment. These two decisions illustrate the need for a continuing assessment of judicial opinions to ensure that the interests of free expression for military personnel are articulated and defended. (HOD)

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FREE SPEECH IN THE MILITARY: A STATUS REPORT

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FREE SPEECH IN THE MILITARY: A STATUS REPORT

Protection of the Nation's security historically has constituted a most compelling justification for the suppression of free expression.[1] Perhaps nowhere is this trend more evident than in the province of military regulation, where recent decisions of the Supreme Court have emasculated First Amendment guarantees for service personnel. This paper addresses two of these precedent-setting decisions. In Parker v. Levy, the Supreme Court upheld the constitutionality of the infamous "General Articles" of the Uniform Code of Military Justice against the claim that their application violated First Amendment rights.[2] In Brown v. Glines, the Court sanctioned a commander's prior restraint of a serviceman's petition to his Congressman, on the ground that it threatened the good order and discipline of the Armed Services.[3] Taken together, these decisions characterize the military climate as a hostile environment for free expression. The soldier, sailor and pilot are deprived of the very Constitutional rights they are expected to defend with their lives.[4]

Levy

Captain Howard B. Levy, a dermatologist at the United States Army Hospital at Fort Jackson, South Carolina, urged enlisted Special Forces personnel at his post to "refuse to go to Viet Nam if ordered to do so," and claimed that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children."[5] His statements were deemed violative of Articles 133 and 134 of the Uniform Code of Military Justice.[6] Article 133 provides for the punishment of "conduct unbecoming

an officer and a gentleman, while Article 134 proscribes "all disorders and neglects to the prejudice of good order and discipline in the Armed Forces." Levy contended that these provisions are vague and overbroad, and thus constitutionally defective.

The majority of the Court held otherwise. In an opinion destined to serve as precedent in future military free-speech cases, the Court reasoned that the historical context and the language of the General Articles of the Uniform Code provided "fair notice" that Levy's conduct was punishable.[7]

Three serious flaws characterize the majority opinion in the Levy case. First, the Court's resort to "the standard which applies to criminal statutes regulating economic affairs" as "the proper standard of review for a vagueness challenge" is entirely unwarranted.[8] The Court gave no reason why this strained analogy was at all appropriate to the issues of the case. Granted, the language of the prior opinion of the Court in United States v. National Dairy Corp. dovetails nicely with the thinly-disguised intent of the Levy majority.[9] But that fortuitous circumstance in no way justifies attaching a "strong presumptive validity" to rules that proscribe free speech.[10] This move merely opens the door to wholesale suppression of First Amendment rights, a promise that (as we shall see) has been fulfilled. In fact, a presumption against the validity of the statute was ignored in Justice Rehnquist's majority opinion: the presumed applicability of constitutional safeguards in the military environment.[11] Additionally, the principle that a vague statute "violates the first essential of due process of law" is well-established.[12] Justice Stewart's eloquent dissent argued that indeterminate laws trap the innocent who cannot reasonably ascertain how the law is to be applied and invite "discriminatory and

arbitrary enforcement."[13] Rehnquist's majority opinion offers no reply to the latter charge.

Second, the vagueness of the General Articles is not a matter for dispute; even Rehnquist's majority admits that these Articles lack the specificity of civilian statutes.[14] The question remains: are Articles 133 and 134 so vague as to be constitutionally defective? The Stewart dissent contains an indictment of the Uniform Code that is virtually ignored by the majority. Justice Stewart says that the meaning of the General Articles cannot be understood from a perusal of the "Forms for Charges and Specifications" listed in the Appendix to the Uniform Code. Not only does the Appendix fail to list many types of conduct subsequently determined to violate the General Articles; the Appendix also lists conduct which has subsequently been determined to be not violative of the General Articles. Hence service personnel are given little insight into what conduct is "unbecoming of an officer and a gentleman" or what disorders and neglects are prejudicial to the "good order and discipline of the Armed Forces."[15] Given a choice between a lifetime of exercise of First Amendment guarantees and the speculations in the Appendix to the Uniform Code, it is not surprising that Levy chose to follow the guidance of the former. Yet, for this exercise of choice, Levy was convicted. What Rehnquist was expected to prove--that Levy knew his conduct was unprotected--nonetheless merely remained asserted at the conclusion of the majority opinion.

The final flaw in the Levy ruling dealt with the failure of the Court to protect service personnel against capricious or overzealous enforcement of overbroad statutes. Shaman makes the point precisely when he observes: "Parker v. Levy, then, effectively removes military regulations

of speech entirely from the protection of the rules against vagueness and overbreadth."[16] The Court could have demanded that the General Articles be redrafted to specify offenses, but declined to do so. Rather, Justice Rehnquist asserted in his majority opinion that "Articles 133 and 134 do prohibit a 'whole range of easily identifiable and constitutionally proscribable . . . conduct.'"[17] The fact that the General Articles may be invoked against those who do not and cannot foresee the instances of their application left Rehnquist unruffled. Nor was he disturbed by the inevitable consequence of an overly broad statute: the "chilling effects" of the threat of punishment.

In a revealing move, the Court published its decision in the Levy case on June 19, 1974. The following month, on July 8, the court handed down its per curiam decision in a companion case, Secretary of the Navy v. Avrech, which had been argued on February 20,--the same day the Court heard oral argument on the Levy case. The Court ruled against Avrech "on the authority of Parker v. Levy . . .."[18] Yet Avrech's claim that Article 134 of the Uniform Code was unconstitutionally vague provided a more hospitable climate for critics of the Code, for several reasons: (1) he urged other soldiers to "express our feelings and opinions," not to disobey orders; (2) his written statement was never actually communicated to others, but was found and turned over to a superior officer; (3) Avrech was an enlisted soldier, not an officer. Conveniently, the Court avoided the difficult issues in Avrech, preferring the broader scope of Levy's challenges while ignoring the distinctions between the cases. Avrech's conviction was thereby conveniently upheld.

Glines

While on active duty at Travis Air Force Base, reservist Captain Albert Glines drafted petitions to several Congressmen and to the Secretary of Defense complaining about grooming standards imposed upon Air Force personnel. During a routine training flight through Anderson Air Force Base in Guam, Glines gave the petitions to an Air Force sergeant without seeking prior approval from the base commander. The sergeant collected eight signatures before military authorities halted the circulation of the petitions. Glines' commanding officer consequently transferred him from active to standby reserves; in response, Glines brought suit asserting both a constitutional and statutory cause of action. Glines claimed (1) that the requirement of prior command approval for circulated petions violated the First Amendment; and (2) that the regulations were prohibited by 10 U.S.C. § 1034, which prevents any person from restricting a serviceman's communication with Congress "unless the communication is unlawful or violates a regulation necessary to the security of the United States." The Supreme Court rejected Glines' claims, thereby endorsing the virtually unfettered utilization of prior restraints in the military.

The majority opinion of Justice Powell exhibited at least two examples of defective legal reasoning. First, the Court misconstrued the legislative history of 10 U.S.C. § 1034 to limit expression to "the communication of individual grievances," effectively foreclosing to military personnel the right to group petition. Second, the Powell opinion failed to address the profound implications of its decision: i.e., the sanctioning of prior restraint upon free expression in the military.

The peculiar position of the Glines Court with regard to collective petitions was adduced from a comparison of § 1034 with a prior statute designed to guarantee the right of petition to federal civil servants. This "civil servants petition" provision reads, "The right of employees, individually or collectively, to petition Congress or a member of Congress . . . may not be interfered with or denied."[19] The Court underscored the words "individually and collectively," and concluded in a footnote, "Section 1034 stands in marked contrast to" the civil servants law.[20] Hence Justice Powell safely concluded: "It therefore is clear that Congress enacted § 1034 to insure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels."[21] Justice Powell examined the legislative history of § 1034 and concluded that no evidence supported Glines' contention that group petitions were intended to be included in the statute.

Justice Stewart vehemently dissented:

> The historical matrix of the law contains no suggestion that Congress intended § 1034 to cover no more than a letter written and signed by one individual person. If anything is to be drawn from § 1034's history, it is that Congress intended to protect more than single-signature letters. A precise and particularized problem was brought to the attention of Congress in 1951, one that could easily have been remedied by a similarly circumscribed solution. Congress chose instead to write broadly so as to accord protection to all "communications" sent by military personnel to Members of Congress. Clearly, the legislative purpose was to cover the myriad of ways in which a citizen may communicate with his Congressman. By limiting the scope of § 1034 to the particular case brought to the attention of Congress in 1951, the Court, I think, reads the legislative history as mistakenly as it reads the language of the statute itself.[22]

Stewart added in a footnote: "It is worth noting that nothing in § 1034's legislative history indicates that when Congress drafted that provision it

had in mind the slightly different wording of 5 U.S.C. § 7211 . . . , which explicitly protects the petitioning rights of federal civil servants.[23]

Why all the fuss about a questionable comparison between statutes? The very meaning of "communication" in the law resides in this fatuous analogy. For if, as Justice Stewart observed, petitions do not constitute a form of "communication" within the meaning of § 1034, and if "communication" is limited to writing as the majority opinion contends, then the right to "petition" is drastically limited.[24] Dash's comment in the Brooklyn Law Review explored the implications:

> By limiting § 1034 to single signature letters, the Court worked a special hardship on those servicemembers who lack the skills and verbal ability to compose cogent letters of their own or to communicate effectively orally. Such servicemembers are effectively deprived of an important avenue of communication with members of Congress. Even for members of the armed forces who are reasonably adept at speaking, other means of communicating a grievance, for instance personal visits or telephone calls, are not feasible alternatives to petitioning. The cost of travel and long distance telephone calls may be beyond the means of the aggrieved servicemember. Moreover, if the telephone is used, it is unlikely that a member of Congress would be available personally to accept such a call and a phone message relayed by a staff member or secretary is unlikely to have the same impact as a petition.

Dash also noted that "[t]he distinct superiority of the collective petition over other methods of communication, including the individual letter, has been recognized by the courts," and cited several opinions to this effect.[26] In short, the Court's ruling on the right to "communicate" to Congress establishes a powerful and dangerous precedent for future First Amendment case law.

The second weakness of the Court's majority opinion in Glines is evident in Justice Powell's startling lack of deference to precedent. In his blanket endorsement of prior restraint in the military, the Court

cavalierly dismissed the "'heavy' presumption against . . . constitutional validity" that characterizes a priori censorship.[27] It ignored the time-honored principle, articulated in Patterson v. Colorado, that the "main purpose" of the First Amendment was to prevent the prior restraint of speech.[28] Most importantly, the Powell ruling significantly (though subtly) altered the Court's previously-articulated test for assessing the constitutional validity of government-inspired prior restraints. In Procunier v. Martinez, the Court held that such restrictions may be imposed only when they "further an important or substantial government interest unrelated to the suppression of expression," and are "no greater than is necessary or essential to the protection of the particular government interest involved."[29] Six years later the Glines Court relaxed the standard, requiring the government to demonstrate merely that the restrictions were "reasonably necessary" to the protection of its interest.[30]

This unfortunate word choice significantly reduced the burden of the government. In Procunier, the Court struck down as unconstitutional a mail-censorship program for prisoners because the government had at its disposal other methods less threatening to First Amendment rights. In Glines the Court, armed with an adjective, found the regulations authorizing prior restraint to be "reasonably necessary" to the unimpeded operation of the military establishment. No attempt was made to compel the government to prove that less sweeping restrictions were unavailable. Once the substantial interest of "military necessity" was parroted in the opening paragraphs of Glines, the Court's conclusion was preordained.

Argument theorists as well as students of the law may find the implications of the "reasonably necessary" test most instructive. In United

States Trust Co. v. New Jersey, the Court prohibited the impairment of contracts and holders of bonds on the ground that the impairment was not "reasonable and necessary" to an important state interest.[31] In a vigorous dissent to the development of the "reasonable and necessary" test, Justice Brennan contended: "Reasonableness generally has signified the most relaxed regime of judicial inquiry, . . . [while] the element of necessity traditionally has played a key role in the most penetrating mode of judicial review."[32] Dash added, "The Glines Court, in employing a similarly fused test, is likely to engender the same problem Justice Brennan warned of in United States Trust, namely that lower courts will 'face considerable confusion in wielding such a schizophrenic . . . instrument.'"[33]

This explicit compromise of the Court's longstanding disinclination to sanction prior restraints has incalculable ramifications. Zillman and Imwinkelried flatly contend that "censorship often is the policy most disruptive of military discipline and morale."[34] Surely the Glines decision grants military commanders carte blanche to impose a priori restraints upon service personnel. Unfortunately, if the "chilling effect" theory is correct, we may never obtain convincing evidence of the results of such a program, for the unarticulated thoughts of service personnel are likely to be expressed only in silent rage.

Conclusions

The gravest implication of poorly-reasoned case law is not the impact upon the parties to the dispute. Rather, it is the reiteration of poorly-constructed legal principles in future cases that is most painful to students and scholars of the law. The Levy rule is being systematically

applied in free speech cases involving the General Articles, and the results have been predictable.[35] In Carlson v. Schlesinger, the Court of Appeals for the District of Columbia rejected the free-speech claims of a pilot who solicited signatures for antiwar petitions.[36] In Priest v. Secretary of the Navy, the same Court endorsed a diluted version of the "clear and present danger" test as the appropriate standard for judging free-speech claims.[37] In both cases the Court relied on the Levy decision as dispositive of the First Amendment issues.

The Glines Court likewise cited the Levy decision approvingly. "The military is, 'by necessity, a specialized society separate from civilian society.'"[38] Hence the first element of the Procunier test was satisfied: a "substantial government interest unrelated to the suppression of free expression" was identified for protection.[39] Hence one weak rationale provides the framework for yet another defective justification. The process need never stop; today's questionable assumption becomes tomorrow's unquestioned presumption.

The fear, of course, is that the Court will attempt to extend its perversions of the Procunier test into the civilian sphere when some substantial government interest is "threatened" by free expression. Should this occur, only two outcomes are probable. Either the tenuous reasoning of the Court will inherit more cogent criticism than it can possibly sustain, and the entire edifice will collapse; or the urgency of the moment will stifle the critics (as in the McCarthy era), and the forces of censorship and suppression will have their way. Continuing assessment of judicial opinions, even in the rarefied air of military law, is imperative to insure that the interests of free expression are articulated and defended.

Footnotes

[1]See, e.g., Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: U. of Chicago Press, 1981), pp. 388-409.

[2]417 U.S. 733 (1974).

[3]444 U.S. 348 (1980).

[4]See, e.g., United States v. Robel, 389 U.S. 258, at 264 (1967), for an articulation of this position with regard to freedom of association.

[5]417 U.S. 733, at 737 (1974).

[6]10 U.S.C. § 933 and 934, respectively.

[7]417 U.S. 733, at 755 (1974).

[8]417 U.S. 733, at 756 (1974).

[9]312 U.S. 29, at 32-33 (1963).

[10]Ibid.

[11]"United States v. Wysong, 9 USCMA 249, 26 CMR 29 (1958); United States v. Gray, 20 USCMA 63, at 66, 42 CMR 255 (1970).

[12]Connally v. General Construction Co., 269 U.S. 385, at 391 (1926).

[13]417 U.S. 733, at 744-75 (1974).

[14]417 U.S. 733, at 754 (1974).

[15]417 U.S. 733, at 783-85 (1974).

[16]Jeffrey M. Shaman, "The First Amendment Rule Against Overbreadth," Temple Law Quarterly 56 (1979), 259-82, at 272.

[17]417 U.S. 733, at 760, citing United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, at 580-81 (1973).

[18]418 U.S. 676, at 678 (1974). See also, "Constitutional Law--Uniform Code of Military Justice--The General Article is Unconstitutionally Vague and Overbroad. Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973)," Saint Louis University Law Journal 18 (1973), 150-69.

[19]The Act of August 24, 1912, Ch. 389, § 6, 37 Stat. 355; this is currently classified as 5 U.S.C. § 7211 (1976 ed., Supp. II).

[20]444 U.S. 348, at 359, note 18 (1979).

[21]444 U.S. 348, at 359 (1979) (emphasis supplied.)

[22]444 U.S. 348, at 376 (1979).

[23]444 U.S. 348, at 376, note 2 (1979).

[24]444 U.S. 348, at 375-76 (1979).

[25]"Brown v. Glines: Bowing to the 'Shibboleth of Military Necessity," Brooklyn Law Review 47 (1980), 249-82, at 277, note 149 (hereafter cited as, "Bowing to the Shibboloth").

[26]Ibid, at note 151.

[27]Organization for a Better Austin v. Keefe, 402 U.S. 415, at 419 (1971).

[28]205 U.S. 454, at 462 (1907).

[29]416 U.S. 396, at 413 (1974) (emphasis supplied).

[30]444 U.S. 348, at 355 (1980).

[31]431 U.S. 1 (1977).

[32]431 U.S. 1, at 54, note 17 (1977).

[33]"Bowing to the Shibboleth," p. 263, note 80, citing 431 U.S. 1, at 54, note 17 (1977).

[34]Donald N. Zillman and Edward J. Imwinkelried, "Constitutional Rights and Military Necessity: Reflections on the Society Apart," Notre Dame Lawyer, 51 (1976), 396-411, at 410.

[35]See, e.g., Paul Siegel, "Protecting Political Speech: Brandenburg v. Ohio updated," Quarterly Journal of Speech 67 (1981), 69-80, at 75-76.

[36]511 F. 2d 1327, at 1337 (1975).

[37]570 F. 2d 1013, at 1016 (1972).

[38]444 U.S. 348, at 354 (1980).

[39]Ibid.